Supreme Court, U. S.
FILED
SEP 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-255

MELVILLE T. BARR,

Petitioner,

v.

MICHAEL J. GIACOPELLI and STEPHEN DEMAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

HERBERT W. STERENFELD
Counsel for Respondents
Michael J. Giacopelli and
Stephen Demas
299 Broadway
New York, New York 10007

Of Counsel:
HERBERT W. STERENFELD
JACK STEINMAN

IN THE

Supreme Court of the United States

No. 79-255

MELVILLE T. BARR,

Petitioner,

v.

MICHAEL J. GIACOPELLI and STEPHEN DEMAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the order of the Court of Appeals for the Second Circuit denying a writ of mandamus, its order denying the petition for rehearing and its order denying the suggestion for rehearing *en banc*.

REASONS WHY THE WRIT SHOULD BE DENIED

Neither the orders below nor the record raise sufficient grounds for granting a writ of certiorari.

1. The issues presented in the petition do not meet the standards as set forth in Rule 19 of the Supreme Court Rules.

Rule 19 of the Supreme Court Rules states in part:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> • • •
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . .

Petitioner in his brief nowhere contends that there is a conflict of decisions between the various Courts of Appeals on the issue of transfer motions pursuant to 28 U.S.C. § 1404(a).

Petitioner's sole basis for seeking a writ of certiorari is his assertion that there exists "uncertainty amongst the Circuits" with regard to the standards for review of transfer motions.

It is respectfully submitted that there is no "uncertainty" or confusion, nor is there any conflict amongst the various Courts of Appeals with regard to review of these motions.

Each and every Court of Appeals that has had mandamus petitions before it on transfer motions has determined that mandamus is an appropriate remedy to review such transfer motions.

Each Court of Appeals has also determined, albeit in language different only in inconsequential respects, that mandamus will not be granted unless there is a showing that the District Court, (1) acted beyond its jurisdiction; (2) acted in violation of procedural due process; or (3) evidenced a clearcut or gross abuse of discretion.

This Honorable Court has granted certiorari to review mandamus motions only in those transfer cases relating to jurisdictional questions.[1] No case has been cited by petitioner wherein this Court has granted certiorari to review a mandamus petition in a transfer case relating solely to the discretionary acts of a District Judge.

Moreover, in *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379 (1953), a case involving a transfer, this Court affirmed the dismissal of a petition for mandamus by the Court below, concluding that mandamus was not proper to vacate the order of the District Court in the absence of special circumstances showing a clear abuse of discretion or usurpation of judicial power.

Thus, respondents respectfully submit that after a reading of all of the decisions cited by petitioner from the various Courts of Appeals, it is abundantly clear that not only is there no conflict between the various Courts of Appeals, but on the contrary, there is agreement amongst the Circuits that mandamus is available to review transfer motions. The aforesaid Courts have stated uniformly that mandamus will not be granted where petitioners seek to obtain interlocutory review of non-appealable orders, under the guise of labels such as "abuse of discretion", "clear abuse of discretion", "gross abuse of discretion", etc. It is clear that all Courts of Appeals will be guided in their dispositions of petitions for extraordinary writs, by considering whether the District Courts followed the criteria set forth in the statute (28 U.S.C. § 1404(a)). If they determine that the criteria were followed by the District Judge, they will not grant mandamus. *Will* v. *United States,* 389 U.S. 90 (1967).

---

[1] *Hoffman* v. *Blaski,* 363 U.S. 335 (1960); *Van Dusen* v. *Barrack,* 376 U.S. 612 (1964), wherein the Supreme Court dealt with the construction and meaning of that portion of 28 U.S.C. § 1404(a), wherein it is provided "where it might have been brought"; the issue presented being the jurisdiction of the transferee court.

In *A. Olinick & Sons* v. *Dempster Brothers, Inc.*, 365 F.2d 439 (2d Cir. 1966), Judge Moore writing for the Court below, after reviewing the decisions of the various Courts of Appeals, commented upon the overwhelming consensus of the Courts of Appeals in the following language, at page 444:

> What emerges from a review of the cases is a strong sense of appellate reluctance to interfere with the District Court's exercise of its discretion under 28 U.S.C. § 1404(a). The reasons for this reluctance are not hard to find. The Courts of Appeals understandably wish to reserve power to redress clearcut abuses of discretion in the handling of § 1404(a) motions, since such abuses cause great inconvenience and expense to the litigants and are almost impossible to correct by review after trial. See Ford Motor Co. v. Ryan, 182 F. 2d 329, 330 (2d Cir.), cert. denied, 340 U.S. 851, 71 S.Ct. 79, 95 L.Ed. 624 (1950). At the same time, the Courts of Appeals are aware that the trial judge, with his superior opportunity to familiarize himself with the nature of the case and the probable testimony on trial, is better able to dispose of § 1404(a) motions; that the statute by its terms vests broad discretion in the trial judge in considering the convenience of the parties and witnesses and the interest of justice; and that extended review by the appellate courts of the disposition of § 1404(a) motions will prolong litigation and thwart the objectives of speedy and efficient trial which § 1404(a) sought to further. For these reasons, dispositions of § 1404(a) motions have almost never been overturned for abuse of discretion . . .

In the instant case, the District Court, after considering all of the papers submitted by both sides and after hearing oral argument by counsel, and taking into account the statutory criteria, in the exercise of its discretion, decided that

the motion to transfer was not warranted. Upon motion for reargument in the District Court, the District Court Judge indicated again "having examined the papers submitted with regard to this motion and considered all of the arguments in light of the pertinent statutory criteria, it is the opinion of this court that the facts of this case do not warrant transfer."

Upon petition to the Court below by the petitioner for a writ of mandamus, to review the decision by the District Court, respondents were ordered to submit a brief in opposition. The Court below, then having the benefit of briefs from both sides and exercising its discretion, denied the petition for mandamus, without opinion. Upon petitioner's application for reargument, with a suggestion for reargument *en banc*, the entire Court below in the exercise of its discretion, again denied the petition for mandamus.

It is respectfully urged by respondents that this Court should exercise its discretion under all of the facts and circumstances herein and deny petitioner's writ of certiorari.

It is respectfully submitted that not only is there no uncertainty or confusion amongst the various Courts of Appeals, neither "uncertainty" or "confusion" being designated in Rule 19 of the Rules of this Court as grounds for granting a writ of certiorari, there is no conflict amongst the various Courts of Appeals which would be the only grounds for granting a writ of certiorari under the facts and circumstances of this case.

2. This cause does not fall within the category of "extraordinary causes". It is not even claimed by the petitioner that this action is an extraordinary cause. In simplest terms, this action involves a claim for property damage as a result of the alleged negligence of the petitioner, his agents, servants and/or employees resulting in the death of a race horse.

In *Will* v. *United States,* 389 U.S. 90 (1967), this Court in ruling on the writ of mandamus, reaffirmed its holding in *Ex parte Fahey,* 332 U.S. 258, 260 (1947):

> As extraordinary remedies, they are reserved for really extraordinary causes.

In *American Flyers Airline Corporation* v. *Farrell,* 385 F. 2d 936 (2d Cir. 1967), Judge Medina writing for the Court below, in an action wherein mandamus was sought against a District Court Judge who had refused to transfer a tort action, pursuant to 28 U.S.C. § 1404(a), stated at page 937:

> The test is the one we announced as long ago as 1955 in Torres v. Walsh, 221 F.2d 319 (2d Cir. 1955), cert. denied 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 746, citing a long line of Supreme Court cases to the effect that the writ may issue only "in really extraordinary causes."

Judge Medina commenting upon the nature of the case before the Court below, stated at page 938:

> There is nothing "really extraordinary" about this cause. Nor are there any "extraordinary circumstances." . . . This state of affairs is not even unusual let alone "really extraordinary." As transfer motions are always addressed to the discretion of the court, it need not surprise anyone that the discretion is sometimes exercised in favor of granting the transfer and sometimes not.

As has been clearly shown, the instant tort action is no more than a garden variety, run-of-the-mill type of litigation, which is regularly heard in the District Courts, when diversity jurisdiction is established.

This is not an "extraordinary cause" warranting the grant of a writ of certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case should be denied.

Respectfully submitted,

HERBERT W. STERENFELD
Counsel for Respondents
Michael J. Giacopelli and
Stephen Demas
299 Broadway
New York, New York 10007

Of Counsel:

HERBERT W. STERENFELD
JACK STEINMAN